

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:MAN:3:TL-N-308-01
RLPeacock

date:

to: Robert C. Skiba, Territory Manager
Large and Mid-Size Business Division (Financial Services and
Healthcare)
Attn: Revenue Agent Frank A. Sacco

from: Area Counsel (Financial Services & Healthcare) (Area 1: Manhattan)

subject: [REDACTED] & Subsidiaries
Form 872 - Taxable year [REDACTED]

STATUTE OF LIMITATIONS EXPIRES [REDACTED]

UIL Nos. 6501.08-00 and 6501.08-17

DISCLOSURE STATEMENT

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This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the Field Office with jurisdiction over the case.

INTRODUCTION

This memorandum is in response to your request for advice in the above-captioned matter. Specifically, you have asked our office which entity should execute a Form 872 Consent to Extend the Time to Assess Taxes ("Form 872") with respect to a Form 1042 Annual Withholding Tax Return for U.S. Source Income of Foreign Persons ("Form 1042") filed by [REDACTED] (EIN [REDACTED]) ("[REDACTED]"). In addition, you have asked us to provide you with the appropriate language to use on the Form 872. The statute of limitations on assessment currently expires on [REDACTED].

ISSUES

1. Which entity should execute a Form 872 with respect to a Form 1042 filed by [REDACTED] for the taxable year [REDACTED]?
2. What specific language should be used on the Form 872?

BACKGROUND

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routing procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office, which should be in approximately 10 days. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

[REDACTED] is a New York Corporation. Prior to [REDACTED], [REDACTED] was known as [REDACTED]. On [REDACTED], [REDACTED] converted from a mutual life insurance company to a stock life insurance company and became a wholly owned subsidiary of [REDACTED], a Delaware corporation organized for the purpose of becoming the parent holding company of [REDACTED]. Effective [REDACTED], [REDACTED] changed its name to [REDACTED]. Although the taxpayer was known as [REDACTED] during [REDACTED], the taxable year at issue, we will refer to the taxpayer throughout this opinion as [REDACTED].

The LMSB Manhattan examiners are presently conducting an examination of the consolidated income tax returns of [REDACTED] for the taxable years [REDACTED] through [REDACTED].

During the course of this examination, a question has arisen as to the proper wording of a Form 872 for a Form 1042 filed by [REDACTED] for the [REDACTED] taxable year. On the Form 1042, [REDACTED] reported withholding on certain annuity policies issued by [REDACTED] to foreign taxpayers. The Form 1042 was signed by [REDACTED] Tax Coordinator for Compliance for [REDACTED]. At the time she signed the Form 1042, she was authorized by an officer of [REDACTED] to sign the return.

[REDACTED] also filed a Form 1042S Foreign Person's U.S. Source Income Subject to Withholding ("Form 1042S") information return, in which it provided the names and addresses of the payees and listed its own name and address in Box 9, "Withholding Agent's name and address."

The revenue agent issued IDR No. 25 to [REDACTED] in which he requested information about, inter alia, the business relationship between [REDACTED] and [REDACTED]. On [REDACTED], in response to IDR No. 25, [REDACTED] replied,

[REDACTED] uses the name "[REDACTED]" and separate EIN ([REDACTED]) to distinguish annuitants withholding from payroll and any other withholding of the [REDACTED]. It is not a division or business unit or separate legal entity. There is no separate bank account maintained under the name [REDACTED].

...

... [REDACTED] has been filing under this name and ID number since [REDACTED].

A representative from [REDACTED] indicated to the revenue agent that [REDACTED] never filed any documents with the Secretary of State on behalf of [REDACTED].

Neither [REDACTED] nor any of its subsidiaries filed any other Forms 1042 for the [REDACTED] taxable year.

DISCUSSION

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

We further note that according to section 3461 of the Restructuring and Reform Act of 1998 (codified at I.R.C. § 6501(c)(4)(B)), you must advise the taxpayer of its right to refuse to extend the statute of limitations or, alternatively, to limit an extension to particular issues or specific periods of time. We suggest using Publication 1035 when soliciting the Form 872 to satisfy this requirement, or advising the taxpayer orally or by other writing. In any event, please be sure to document your actions in the case file.

1. Which entity should execute a Form 872 with respect to a Form 1042 filed by [REDACTED] for the taxable year [REDACTED]?

I.R.C. § 1441(a) requires that any person having "the control, receipt, custody, disposal, or payment of any of the items of income specified in subsection (b) ... of any nonresident alien individual ... shall ... deduct and withhold from such items a tax equal to 30 percent thereof...." Annuities are specifically included in the items of income set forth in I.R.C. § 1441(b). The person who has the control over the income is known as a "withholding agent." Although more than one person may qualify as a withholding agent, only one tax is required to be withheld and deposited. See Treas. Reg. § 1.1441-7(a). The withholding agent is liable for the tax. See I.R.C. § 1461.

To report the withholding required by I.R.C. § 1441(a), the withholding agent must file a Form 1042 on or before March 15 of the year following the close of the calendar year in which the payor paid the income. See Treas. Reg. § 1.1461-1(b). Because the Form 1042 is a "Return Of Certain Employment Taxes And Tax Imposed By Chapter 3," the Form 1042 is considered filed on April

15 of the succeeding calendar year. I.R.C. § 6501(b)(2). The withholding agent must also file a Form 1042S information return, identifying the names and addresses of payees and of the payor, if the payor is different from the withholding agent. See Treas. Reg. § 1.1461-1(c).

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). A Form 1042 which is filed for any of the four quarters of a calendar year is deemed filed on April 15 of the succeeding year. See Treas. Reg. § 301.6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. The Service uses a Form 872 to extend the period of limitations for Form 1042. See I.R.M. Handbook No. 104.6, Employment Tax Handbook, § 13.7.1.

Here, [REDACTED] was the withholding agent for [REDACTED] for [REDACTED]. According to [REDACTED] the information on the Form 1042 reflects withholding on income from annuity policies issued by [REDACTED]. [REDACTED] has asserted that it created [REDACTED] so that [REDACTED] could differentiate between its withholding on foreign source income and its regular withholding (i.e., payroll withholding and withholding on U.S. source income). [REDACTED] is not any separate legal entity or division within [REDACTED]. Instead, [REDACTED] is essentially an alter ego of [REDACTED]. In response to IDR No. 25, [REDACTED] acknowledged that neither it nor any of its subsidiaries filed any other Forms 1042 for the taxable year [REDACTED]. In addition, the Form 1042 filed by [REDACTED] was signed by an employee of [REDACTED]. Based on the foregoing, [REDACTED] as the withholding agent for [REDACTED], is the proper entity to execute a Form 872 with respect to the Form 1042.

Absent any extension, the statute of limitations with respect to the withholding liability of [REDACTED] will currently expire on [REDACTED].

Note that the regulations under section 6501(c)(4) do not specify who may sign consents to extend the statute of limitations. Accordingly, the rules applicable to the execution of an original return have been deemed to apply to the execution of a consent to extend the time to make an assessment. See Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. In the case of a corporate return, section 6062 provides that a corporation's income tax returns

must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Here, the representatives of [REDACTED] have indicated that [REDACTED] was authorized by an officer to sign the Form 1042.

2. What specific language should be used on the Form 872?

The caption of the Form 872 extending the statute of limitations for [REDACTED]'s [REDACTED] foreign withholding liability should read as follows:

"[REDACTED] (EIN [REDACTED]), as withholding agent for [REDACTED] (EIN [REDACTED]), formerly known as [REDACTED]."

The EIN of [REDACTED] should be entered in the upper right hand corner of the Form 872.

Since the tax liability is arguably that of [REDACTED], we suggest that it also execute a Form 872 to ensure its liability. Therefore, you may also secure a second Form 872 in the name of "[REDACTED] (EIN [REDACTED]), formerly known as [REDACTED]" for the foreign withholding liability of [REDACTED].

Should you have any questions regarding this matter, please contact Robin L. Peacock at (212) 264-1595, extension 246.

ROLAND BARRAL
Area Counsel
(Financial Services and
Healthcare: Manhattan)

By: _____

PETER J. LABELLE
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